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THE RIGHT TO PRIVACY IN MANDATORY DRUG TESTING: EXPLORING THE PUBLIC AND PRIVATE DOMAINS

Adam Farrell and Jon Collier

I. INTRODUCTION

In 1987, Edward P. Twigg was working as material planner for Hercules Corporation in Mineral County, West Virginia, assisting in the maintenance of supplies for the business. Twigg had been with the company for nearly a decade, and had performed his duties satisfactorily as evidenced by numerous positive evaluations and promotions. In December, 1984, Hercules Corp. implemented “a policy of mandatory, random drug testing for its employees.” This was heavily implemented throughout 1986, and Twigg was selected for a mandatory urinalysis drug test twice during that year, providing a negative result both times. Twigg was vocal in communicating to his superiors his objections to the policy, but submitted to the test both of these occasions. In July 1987, Twigg was selected again for a mandatory drug test to be administered on that day. Twigg voiced his opposition to the policy again, to which the management at Alle

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1 Adam and Jon are students at Brigham Young University, majoring in Asian Studies and European Studies respectively. They plan to enter law school during fall 2016. Special thanks to the authors and editors of the BYU Pre-Law Review for their help in preparing this article for publication.


3 See generally Id.

4 Id. at 53
pany responded by informing him that he would be terminated from employment if he did not submit to the drug test. Twigg refused to submit to the test, and was consequently discharged by Hercules on July 29, 1987.

Experiences like that of Edward Twigg are not uncommon—private companies have been implementing policies of mandatory drug testing for decades, and most large companies in the United States currently require drug testing of their employees.5 Private companies have a strong incentive to test their employees, as drug use in the workplace can lead to numerous problems such as lost productivity, accidents and injuries, insurance rate increases, and legal liability.6 Furthermore, employers in the United States have historically operated under the “employment-at-will”7 doctrine, which gives them wide discretion in disciplining employees and taking actions to control the workplace environment.8 In the years since drug testing technology has become available and affordable, many employers have exercised this discretion by requiring their employees to undergo mandatory drug testing, usually at random, in order to preserve the commonly accepted notion of ideal working conditions.

These policies, however, have been shown to be somewhat problematic. On one hand, questions have been raised as to the effectiveness of drug testing programs in the workplace, as well as the


6 Rothstein, Supra note 5, at 688.

7 Hennessey v. Costal Eagle Point Oil Co. 609, A. 2D 11, 14 (N.J. 1992) (quoting Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884) “The traditional common-law rule was that an employer could fire an at-will employee ‘for good cause, for no cause, or even for cause morally wrong…”

actual negative impact of drug users in the workplace.⁹ While these are important developments to consider, there is little evidence to suggest that an employer would not be justified in terminating an employee who is known to use illicit drugs, so this article will operate under the assumption that such a decision would be justified. The problems with these policies arise primarily with the methods used to obtain information about the employee’s drug use, especially as it pertains to the employee’s right to privacy.¹⁰ Jurisprudence in the public sphere has dealt with the balance between an employer’s right for information and the employee’s protection from unreasonable search and seizure under the Fourth Amendment.¹¹ Such cases have found that “it is undisputed that a drug test is a search under the Fourth Amendment, and that the government generally has the burden of justifying a warrantless search.”¹² While the protections of the Fourth Amendment do not directly apply in the private sphere, many states have incorporated that principle into their state constitutions, and courts have often cited the right to privacy as an element of common law.¹³ With the understanding of privacy as a human right (at least to some extent), it becomes imperative to determine


¹⁰ See generally Edward J. Bloustein Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. 39 N.Y.U. L. REV., Vol. 39: 962, 964. (1964). Bloustein and others have established the right to privacy as an element of tort law, while many states have incorporated it into their state constitutions. The right to privacy will be further discussed throughout this article.


¹² Lebron v. Secretary, Florida Dept. of Children, 710 F 1202 (11th Cir. 2013).

whether an employer’s use of mandatory, suspicionless drug testing violates that right.

Claiming that the drug testing policy of Hercules Corp. violated his right to privacy, Twigg appealed his case to the Supreme Court of West Virginia. The Court cited an earlier ruling which established precedent requiring employers to be “held liable where an employee’s discharge contravenes a substantial public policy,” which had previously limited the discretion of employers in their decisions to terminate at-will employees.\textsuperscript{14} The Court had also previously ruled (in \textit{Cordle v. General Hugh Mercer Corp.}) that an employee could not be fired upon refusal to take a mandatory polygraph test, further limiting the testing procedures an employer was allowed to implement.\textsuperscript{15} Based on the findings of these two rulings, the Court was required primarily to decide whether Twigg’s privacy had been violated by the requirement to submit to a urinalysis drug test. In protecting the right to privacy, the Court found that mandatory drug testing should only be conducted by an employer in cases where (1) the employer has reasonable suspicion of the employee’s drug use, or (2) the job responsibilities of the employee involve the safety of others or public safety.\textsuperscript{16}

The West Virginia Supreme Court’s decision in \textit{Cordle} includes the following statement: “In West Virginia, a legally protected interest in privacy is recognized.”\textsuperscript{17} This “legally protected interest in privacy” must be the basis of policy decisions regarding mandatory drug testing, both in the public and the private sphere. Reasonable exceptions, such as the ones listed by the Court above, must be made at times, but the law should fundamentally serve to protect the privacy of United States citizens. This article will discuss the historical legal

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\textsuperscript{16} Twigg v. Hercules Corp., \textit{Supra} note 2, at 56.
\end{flushleft}
basis of drug testing, constitutional issues with mandatory testing (particularly as it relates to the Fourth Amendment), and the ways in which drug testing policies consistently violate the right to privacy. It will advocate the establishment of the right to privacy as the primary consideration in cases regarding mandatory drug testing.

II. HISTORICAL LEGAL BASIS FOR DRUG TESTING

One of the main motivating factors behind the emergence of drug testing is the prevalence of drugs in American society. Many experts, some within the legal community, consider drugs to be “one of America’s most pervasive, serious, tragic and seemingly intractable social problems.”18 The National Institute on Drug Abuse measures the nationwide drug use trends in an annual study called the National Survey on Drug Use and Health (NSDUH), which provides important information about drug use and its consequent abuse and dependence among Americans. According to the Substance Abuse and Mental Health Services Administration, survey participants report which substances they have used (1) in the past month, (2) in the past year, and (3) over the course of their lifetime. The data collected from the NSDUH suggests that in 2012, 23.9 million Americans, or 9.2% of the population, were current users of illicit drugs (which indicates that they have used within the past month). In 2002 the rate was 8.3%, and there has been a steady increase over the past decade.19 Because of this increase and the prevalence of drugs in the United States, a larger emphasis has been placed on combatting illicit drug abuse.

Although there has lately been a measurable increase in the trend of drug use, drugs have always had a presence in American society, as have the problems associated with them. Throughout America’s history there have been several attempts to deal with the drug problem, including several different efforts by the United States government

18 Rothstein, Supra note 6, at 63.
to control drug use. For example, alcohol has been the subject of various forms of restriction, including complete prohibition with the ratification of the Eighteenth Amendment\textsuperscript{20}. This effort criminalized alcohol and prohibited the sale or use of it. This amendment was later repealed with the ratification of the Twenty-First Amendment\textsuperscript{21}, and the government shifted towards regulation. The criminal stigma was removed from alcohol, and while the use of alcohol was accepted, there were different controls imposed which alleviated some of the negative effects of alcohol. As the regular use of alcohol has become more prevalent, alcohol use has begun to be seen as acceptable as long as it kept within reasonable limits. Illegal drugs, however, are by their very nature prohibited in the United States, and mandatory drug testing has been imposed to mitigate the adverse effects of illicit drugs in society. The concern in the United States about rising drug use is driven by the significant costs associated with the use of drugs, which have been stated to include the following: crime, an increased burden on the justice system, healthcare, increased disease, and lost work productivity. Rather than adopt the regulatory measures that have proven more efficient in controlling alcohol abuse, the United States has generally maintained a policy of eradication in regards to drug use, citing the negative consequences listed above.

In recent years, one of the largest combative efforts against drug use has been drug testing. These screening programs have been particularly prevalent in the workplace. The push for drug testing in the workplace originated with the government implementation of screening in the military in 1981.\textsuperscript{22} Years later, in 1986, President Ronald Reagan issued the executive order for a drug-free federal workplace stating, “The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces” through “demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal

\begin{footnotesize}
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\item \textsuperscript{20} U.S. Const. art. XVIII, § 1, cl. 1.
\item \textsuperscript{21} U.S. Const. art. XXI, § 1, cl. 1.
\end{itemize}
\end{footnotesize}
workplace.”23 This extended the practice of drug testing to federal employees in sensitive positions. The broad terminology of “sensitive positions” meant that the proposed executive order “would permit drug testing of more than half of all Federal civilian workers.” Almost every Federal agency would establish a drug testing program that would “cover employees who have access to secret or sensitive information.”24

The government has continued to use the workplace as its focus to fight drugs, because drug abuse costs employers $81 billion annually25. In addition to the direct costs, “drug use, abuse or addiction among employees and their family members can cause expensive problems for business and industry, ranging from lost productivity, absenteeism, injuries, fatalities, theft and low employee morale, to an increase in health care, legal liabilities and workers’ compensation costs.”26 As part of the United States Department of Labor, the federal government has established the Drug Free Workplace Alliance. To promote safety and raise awareness of the consequences of drug use, this agency incorporates the technology of drug testing as a means to increase safety and productivity in the workplace. Following the example of these agencies and precedents set in the Federal workplace, the private sector also adopted drug testing procedures, and drug tests have since become common practice. After Reagan’s executive order was issued, drug testing in the nation’s largest companies grew from 3 percent in 1983 to over 50 percent in 1987.27 Today, over 80 percent of Fortune 500 companies have

26 Id.
some form of drug testing for their employees. Despite the fact that private employers are not required to screen for drug use, testing is based on the assumptions that drug use has negative effects on productivity and is costly to employers, and that drug testing is an accurate method of increasing productivity by eliminating potential problems.

While drug tests indicate the use of drugs, they do not necessarily measure impairment. Because they fail in that important area, it is hard to use the test on the grounds of increasing productivity, as it only shows prior use of drugs. It is critical to consider the relationship between drug test results and job performance “because the mere presence of drugs—even if it can be established that their use occurred during work—does not necessarily establish that the worker’s job performance was impaired or represented a safety hazard.”

To illustrate the weak connection between drug use and impairment, consider the case of James Barron. Barron was a welder working at a construction site in 2012. He was unwinding a hose when he fell more than fourteen feet to the concrete floor, suffering injuries to his spine, arms, and liver, and a possible intracranial bleed. The costs of his injuries would have normally been alleviated by worker’s compensation, but Barron was denied the additional funds. He was forced to undertake a drug test after the incident, and the test was returned positive. His claim for disability compensation was denied because it was determined that he had drugs in his system based on the results of this test. In reality, Barron had shared a quarter of a gram of cocaine with a friend two full days before the accident. While his claim was denied on the grounds that he was impaired at the time of the accident, the drugs had no effect on his mental state at that time. This tenuous relationship between drug use and

31 Id. at 13.
workplace impairment makes intrusive mandatory drug tests seem less justifiable, since consideration of the employee’s privacy outweighs the possibility of a result that will indicate nothing about the employee.

It is clear that drug testing is not the most effective way to measure loss of productivity, yet employers in both the private and public sectors continue to embrace it based on that reasoning. Because of a weak federal policy and inconsistent state policies, the private sector is left largely unregulated. Some states have recognized the violation of personal privacy surrounding drug testing and have legislated to protect the privacy of employees. Outside of those states that protect their citizens’ right to privacy, private employers are able to require drug testing of employees without suspicion of drug use and despite good performance at work. In most jurisdictions, private employers are able to perform drug tests on their employees for any reason, or for no reason at all. This type of drug testing has been ruled unconstitutional in the public sphere, and the basis for those rulings—the right of an individual to privacy—should be applied in the private sphere as well.

III. Constitutional Issues with Mandatory, Suspicionless Drug Testing: Fourth Amendment Protection

The advent of effective drug testing technology was immediately followed by the rise of constitutional questions surrounding these procedures: Does a urine-based drug test constitute a search? Does such a search require a warrant? In which cases would this search be considered “unreasonable?” These and other questions began to be answered through two cases: National Treasury Employees Union v. Von Raab and Skinner v. Railway Labor Executives’ Association. Both cases were argued before the United States Supreme Court on November 2, 1988, and decided on March 21, 1989. Though these cases dealt with government organizations and federal law, they set a

32 Skinner v. Railway Labor Executives’ Assn. Supra note 11. see also Treasury Employees v. Von Raab, Supra note 11.
precedent for future cases to be decided by lower courts dealing with state law and private organizations.

In the first case, *Skinner v. Railway Labor Executives’ Association*, the Federal Railroad Administration had recently enacted regulations that allowed them to conduct blood and urine tests for alcohol and drugs on all crew members immediately following an accident or safety violation.\(^3\^3\) The suit was brought immediately by labor organizations affected by this regulation, which held that this violated Fourth Amendment rights. The Fourth Amendment stipulates that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”\(^3\^4\) The petitioners held that this new regulation constituted an unreasonable search, and the Ninth Circuit Court of Appeals agreed, stating that these tests were indeed warrantless searches, and as such, must meet the conditions of “reasonableness” and probable cause imposed on other such searches. Citing several previous rulings, the Supreme Court found that these tests constituted a government search, and that such a search must be reasonable in order to be constitutional.\(^3\^5\) They held, however, that the searches proposed by the FRA were reasonable insofar that “the Government interest in testing without a showing of individualized suspicion is compelling.” The majority argued that the employees who were tested under this law were required to “discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences,” and this was reason enough to have them tested for drugs and alcohol through these invasive procedures.\(^3\^6\) The dissenting justices, however, were adamant that the court had allowed the urgency of the war on drugs to overpower the strength of the law contained in the Fourth Amendment. Citing the World War II relocation camps and the trials of the McCarthy era, Justice Thurgood Marshall warned, “[H]istory

\(^3\^3\) *Skinner v. Railway Labor Executives’ Assn.* *Supra* note 11.
\(^3\^4\) U.S. Const. art. IV, § 1, cl. 1.
\(^3\^5\) *Skinner v. Railway Labor Executives’ Assn.*, *Supra* note 11, at 602.
\(^3\^6\) *Id.* at 637
teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." In the fervor to combat the scourge of drugs, the basic consideration of human rights must not be left behind.

In National Treasury Employees Union v. Von Raab, the court was charged with deciding whether the United States Customs Service violated the Fourth Amendment by requiring a urinalysis drug test from employees seeking transfer or promotion to certain positions. These positions were required to meet at least one of three criteria: (1) they directly involved a drug interdiction or enforcement; (2) they required the employee to carry a firearm; or (3) they required the employee to handle "classified" material. The U.S. Customs Service felt that these employees would be particularly susceptible to bribery, lapses of judgment, or corruption as a result of their drug use, and that the consequences of these actions could be harmful enough to warrant preventative drug screening procedures. The petitioners alleged that these procedures violated their Fourth Amendment rights, and the District Court agreed. The Court of Appeals reversed, however, and the Supreme Court upheld that ruling in a 5-4 decision. The majority in this case used a balancing test, measuring the public interest against the personal privacy of government employees. They failed to rule on employees who handle "classified material," however, as the umbrella of employees proposed by the Customs Service was too broad. In his dissent, Justice Scalia (who upheld the FRA in Skinner) demonstrated a key difference between these two cases:

I joined the Court’s opinion [in Skinner] because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the

37 Id. at 635
38 Treasury Employees v. Von Raab, Supra note 11.
39 Id. at 692
40 Id. at 678
Court’s opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.\textsuperscript{41}

Along with Marshall’s dissent in \textit{Skinner}, Scalia’s dissent points out the potential problems that arise when organizations (especially those under the control of the government) are allowed to perform invasive searches without probable cause.

These two decisions provided a framework by which future cases were decided in lower courts. In these decisions, the court adopted a balancing test to decide whether the use of random or mandatory drug testing for government employees was constitutionally permissible, balancing the interests of the government against the liberty and the privacy of the individual being tested. The court found that in many cases, mandatory drug testing without a warrant violates the Fourth Amendment of the Constitution, protecting individuals from unreasonable search and seizure. It held that in most cases, a warrant must be obtained following demonstration of probable cause in order for an employee to be subjected to a mandatory drug test. It also held, however, that the government might have “special needs beyond the normal need for law enforcement” which are sufficiently compelling to overcome the individual’s privacy interests, which would allow drug testing without a warrant.\textsuperscript{42} The court, however, allowed for a few notable exceptions to this rule: (1) customs officers involved in front-line drug interdiction; (2) customs officers who carry firearms; and (3) train operators where a documented problem with drug/alcohol related accidents existed in the industry.\textsuperscript{43} Essentially, these cases set the precedents that the Fourth Amendment protects individuals from drug testing without suspicion, except for cases of considerable importance that allow for suspicionless searches.

\textsuperscript{41} \textit{Id.} at 681

\textsuperscript{42} \textit{Skinner} v. Railway Labor Executives’ Assn., \textit{Supra} note 11 at 662.

\textsuperscript{43} Treasury Employees v. Von Raab, \textit{Supra} note 11. See also \textit{Skinner} v. Railway Labor Executives’ Assn., \textit{Supra} note 11.
and allow officials to override the Fourth Amendment’s regular requirements of probable cause.

As cases involving drug testing emerged, the Court used the cases of Skinner and Von Robb as their standard for permissible suspicionless drug testing. However, in 1997 the Court moved away from the precedents set in these cases, when they were presented with yet another case concerning the constitutionality of mandatory drug testing by a state government. *Chandler v. Miller*[^44] was a case brought to the Supreme Court regarding a statute legislated by the State of Georgia, which required candidates of state office to complete a drug test in order to qualify for the position[^45]. The drug testing programs in this case were similar to *Skinner and Von Raab*, however, unlike those cases the Court held that Georgia’s statute was unconstitutional and that it did not meet the special needs requirement to not recognize individual right to privacy and countermanded constitutional protections given in the Fourth Amendment.

In *Chandler v. Miller*, Georgia’s drug testing program was considered unconstitutional because the Court decided that this requirement did not meet the exception to the Fourth Amendment. They recognized that the drug test was indeed a suspicionless search, and in order to conduct the search they had to meet the framework to merit a search without individualized suspicion. This was inconsistent with the Courts previous interpretations in *Skinner and Von Raab*. This dissonance between cases demonstrated the need to protect privacy. While the Court continues to analyze suspicionless drug testing cases as a resolution, a more permanent and consistent solution would come from state recognition of privacy rights. As the Court’s erratic decisions illustrate, “consistently interpreting and applying the special needs test in suspicionless drug testing is not an easy task for the court. It is a much more difficult chore for the lower


courts, which are expected to apply the Supreme Court’s muddled interpretations.\textsuperscript{46}

These rulings have since been incorporated into federal drug policy, which requires that federal employees only be subjected to drug testing when there is a sufficient, demonstrable need for sobriety (such as in the operation of heavy machinery). Lower courts and individual state legislatures, however, have interpreted these rulings more broadly, allowing both public and private organizations to enact stringent drug testing policies that infringe on the Fourth Amendment rights of individuals. State policies that fail to follow the rulings of the Supreme Court in these cases often lead to misunderstanding and the violation of individual rights protected in the Fourth Amendment. Such was the case when Luis Lebron was denied temporary financial assistance after refusing to submit to a mandatory drug test. In the case of\textit{ Lebron v. Secretary}, the 11th Circuit Court of Appeals found that the Fourth Amendment rights of Mr. Lebron were violated by the requirement to submit to a mandatory drug test in order to receive financial aid, since the State “failed to establish a substantial special need to support its mandatory suspicionless drug testing of [financial aid] recipients.”\textsuperscript{47} The court cited Skinner and Von Raab in its determination of whether the State was justified in requiring applicants to submit to mandatory drug testing, finding that these applicants did not necessarily “discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences,”\textsuperscript{48} and thus could not be required to submit to a drug test without probable cause.

Another case of privacy violation occurred in\textit{ State v. Moreno}, where a Utah juvenile court ordered a drug test that was not in accordance with the Supreme Court’s rulings in Skinner and Von Raab. The juvenile court had found Mr. Moreno’s daughter guilty of possession of marijuana and attempted possession of methamphetamine,


\textsuperscript{47} Lebron v. Secretary, Florida Dept. of Children,\textit{ Supra} note 12, at 1211.

\textsuperscript{48} Skinner v. Railway Labor Executives’ Assn.,\textit{ Supra} note 11, at 628.
and they considered this reason enough to require Moreno to submit to a drug test.\textsuperscript{49} In the Utah Supreme Court case, “the juvenile court held that it had the power to order parents to submit to drug testing in the context of a child’s delinquency adjudication because the Legislature empowered it to impose reasonable conditions on parents whose children were under the jurisdiction of the court.”\textsuperscript{50} The court reversed this decision, stating that “[t]here is nothing in the Juvenile Court Act that suggests that the parent of a delinquent juvenile has a limited right to privacy,”\textsuperscript{51} and that the interests of the Government in this case do not outweigh Mr. Moreno’s distinct right to privacy. They cited \textit{Skinner} in saying that “except in certain well-defined circumstances, a search or seizure ... is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”\textsuperscript{52}

While the verdict in \textit{State v. Moreno} was a promising sign of reform, placing a high priority on constitutional rights, it was a small victory for privacy among several rulings which have supported the continued invasion of it. Legal scholars have recently noted that the enthusiasm for the “War on Drugs” in the late twentieth century caused many judges to give undue weight to arguments against drug possession and use based on the “pressing concern” of drug proliferation.\textsuperscript{53} This was the concern expressed by justices Marshall and Scalia in their dissenting opinions, which mentioned that the effort to eliminate drugs in the United States must not come at the expense of individual liberties and privacy. While the risks of drug use are still known and proven, more recent research has indicated a shift in the way drug policy should be understood. Information on drug use and possession, like all other personal information, must be based on information ascertained by constitutional means, and the fact that

\begin{itemize}
\item \textsuperscript{49} \textit{State v. Moreno}, 203 P.3d 1000, 2009 U.T. 15 (Utah 2009).
\item \textsuperscript{50} \textit{Id.} at 14.
\item \textsuperscript{51} \textit{State v. Moreno}, 203 P.3d 1000, 2009 U.T. 15 (Utah 2009).
\item \textsuperscript{52} \textit{Skinner v. Railway Labor Executives’ Assn.}, \textit{Supra} note 11, at 619.
\item \textsuperscript{53} Baradaran, Shima, Drugs and Violence (March 31, 2014). S. Cal. L. Rev. 68; 2015 Forthcoming; University of Utah College of Law Research Paper No. 75.
\end{itemize}
a potential crime is drug-related offers no less protection to the defendant. This has been implemented reasonably well in federal law regarding drug testing, with a few notable infringements on individual privacy. The drug testing policies of certain states, however, more commonly include laws or requirements that infringe on the individual privacy protected in the Fourth Amendment.

(i) A Comparative Analysis and Case Study of State Laws on Drug Testing

Unlike many organizations under federal jurisdiction, employers only under the supervision of state governments (and sometimes the state governments themselves) tend to have excessively loose standards when it comes to drug testing. Many states offer few protections to personal privacy, allowing employers or businesses to require a drug test at any time. As Justice Scalia eloquently stated in Von Raab, “The impairment of individual liberties cannot be the means of making a point... Symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.” The Fourth Amendment explicitly protects the right of an individual to privacy, specifically against unreasonable search. While private organizations may not be subject to this amendment, state governments should seek to enact and enforce laws that protect the privacy of individuals, especially when it comes to the intimacy of drug testing.

Utah’s track record for restricting drug testing by private entities is poor, at best. While some small victories for privacy have occurred (such as State v. Moreno, though that involved a government entity rather than a private firm), Utah law generally permits a company to require its employees to submit to a suspicionless drug test at any time. Some advocates for widespread drug testing argue that if a worker is not using drugs, they have nothing to fear from mandatory

54 See generally Baradaran, Supra note 50.
55 Treasury Employees v. Von Raab, Supra note 11, at 687.
56 U.S. Const. art. IV, § 1, cl. 1.
57 Utah Code 34-38-7
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drug testing, and should have no objections to it. By the same reasoning, an individual who is not harboring criminal activity in her house should have no objection a random, suspicionless search of her home. Clearly, this is not the case. The homeowner has a right to privacy (a right that is the basis of the Fourth Amendment), and the same is true for an individual’s right to the privacy of his or her own body. Utah State Law needs to recognize these rights and protect them through restrictions on a company’s ability to test for drugs.

Under Utah law, a company’s reasons for drug tests are broad and varied. They may test in order to investigate possible employee impairment (a case that would theoretically need to involve reasonable suspicion of impairment) or to investigate workplace accidents or theft (a case in which drugs could theoretically be tied to the incident, though the connection is tenuous). Where the Utah Code certainly oversteps the boundaries of personal privacy is in the following: Individuals may be tested in order to “maintain safety for employees or the public,” “maintain productivity,” “maintain product or service quality,” or to “maintain security of property or information.” These provisions have no basis in reasonable suspicion, and they violate an individual’s right to privacy. The only protections granted by the Utah Code stipulate that the employer must distribute the drug testing policy to employees, but a written notice that your rights are being violated does not make that violation justified. The Utah government, like all other state governments, must regulate drug testing within the state, restricting forms of drug testing that violate the right of an individual to privacy.

Apart from safety-sensitive industries, the federal government does not require employers to conduct drug testing, but it also does not prohibit testing. In fact, Federal law sets few limits on drug testing policies and assumes it to be regulated at the state level. Because of this assumption there is a large disparity in drug testing laws in different states. While Utah’s Legislature has attempted to regulate drug testing, they offer little protection for employees.

58 Utah Code 34-38-7
59 Utah Code 34-38-7
60 Utah Code 34-38-7
and often violate constitutional rights. In many states, such as Utah, employees’ privacy rights are overlooked in order to combat the war on drugs. However, the state constitution of California gives each citizen an inalienable right to pursue and obtain privacy. \(^{61}\) California’s right to privacy covers not only government employees, but employees in the private sector as well.

This constitutional amendment was adopted in 1972 and gives privacy the constitutional status of an inalienable right. Because of this, California was one of the first states to provide private employees protection from random drug testing. In the case of *Luck v. Southern Pacific Transportation*, the plaintiff Barbara A. Luck, an engineer at the Southern Pacific Transportation Company, was fired after her refusal to submit to a random drug test by her employer. Luck refused to comply as she viewed this request to be unfair and unnecessary. The company told her that they had no reason to suspect she was impaired and had no complaints with her job performance. Luck filed suit against her employer on the basis that she was exercising her constitutional right to privacy when she refused to submit to a urine sample. The court concluded that the random drug testing required by Southern Pacific was an unjustified invasion of privacy. The jury found that Luck was fired for exercising her constitutional right. \(^{62}\) This case set the precedent that random testing of employees (not in a safety-sensitive position) is unlawful in California and that employees in both the public and private sector have an inalienable right to privacy.

**IV. CONCLUSION**

As demonstrated by *Twigg v. Hercules Corp.*, the right to privacy should be the primary concern of lawmakers and private companies when considering the use of mandatory drug testing. These rights are best protected when they are enshrined in law, as in the state

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\(^{61}\) California Const. Article 1 Section 1

constitutions of California. While the Federal Government’s standard of drug testing in the workplace offers limited protection of the privacy of federal employees, it does little to regulate and ensure the privacy rights of employees in the private sector and certain states. Because of the lack of regulation at a federal level, incongruence has emerged among state drug testing policies, especially for private companies. The Supreme Court has established that drug testing is a search, and the Fourth Amendment protects employees from unreasonable searches and establishes the need for probable cause in cases of mandatory drug testing involving government employees. This has been effectively applied to private companies under the policy of the citizen’s right to privacy, as in Twigg v. Hercules Corp. However, in most jurisdictions, the employee’s right to privacy is being routinely and needlessly violated. This intrusion of privacy is spurred by irrational fears surrounding the war on drugs, which have led many to believe that sacrificing constitutional rights in order to combat illegal drugs is necessary. This compromise of our rights has led states to require drug testing in order to receive government benefits, and for private corporations to disregard the privacy rights of their employees. The right to privacy must be established as the primary consideration in determining whether a mandatory drug test is justified. Whether this is accomplished through amendments to state constitutions or through the common-law recognition of the right to privacy, employers in both the public and the private spheres must be compelled to abide by this standard.